LOS ANGELES
Daily Journal
www.dailyjournal.com

VOL. 126 NO. 151 TUESDAY, AUGUST 6, 2013

GUEST COLUMN

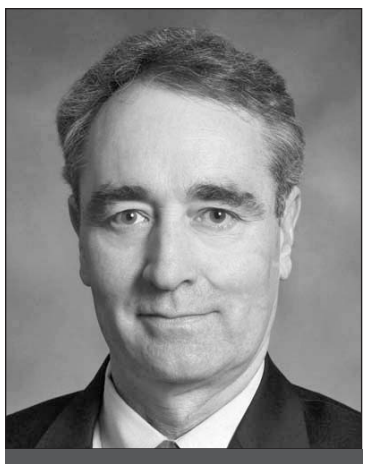
Silicon Valley vs. national security

By Martin Kenney

When it came to privacy, we already knew that, as a condition of service, the high-tech firms we have become so dependent upon were using our information for marketing. We also thought that the U.S. government was judiciously using the data streams of these firms to spy on criminals and potential terrorists. Little did we know or suspect that they were collecting massive amounts of information on *everyone* and that U.S. high-tech executives were entirely complicit in this. The recent revelations by Edward Snowden are so important because he confirmed that the spying is on a far greater scale than any of us even imagined. Moreover, not only do government employees have access to this data, but so do vast armies of contractors and consultants.

As bad as this is, my concern is different. These revelations are extremely dangerous for the business models of Silicon Valley and U.S. high-tech firms. The revelations suggest that our global market leaders are operatives and deliver the world's information to the U.S. government. For citizens living and working in foreign nations, this suggests that their information any-

See Page 6 — SILICON



MARTIN KENNEY
UC Davis

DAILY APPELLATE REPORT

CIVIL LAW

Environmental Law: Expo Authority mistakenly considers future conditions in assessing environmental impacts of light-rail line to Santa Monica, but rejection of report is unnecessary. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (Los Angeles County Metropolitan Transportation Authority),* CA Supreme Court, DAR p. 10304

Taxation: Board of Equalization's new regulation that assesses petroleum refinery property as one unit, including land, improvements, and fixtures, is invalid. *Western States Petroleum Association v. Board of Equalization,* CA Supreme Court, DAR p. 10322

CRIMINAL LAW

Criminal Law and Procedure: Defense attorney's expression of hope that witness might appear in order to corroborate alibi does not render his assistance constitutionally ineffective. *Saesee v. McDonald,* U.S.C.A. 9th, DAR p. 10337

Paul Jones/ Daily Journal

Timothy J. Long of Orrick, Herrington & Sutcliffe LLP is defending CVS in a seating case currently before the 9th U.S. Circuit Court of Appeals.

After settlement, attorneys reassess 'suitable seating' cases

By Laura Hautala
Daily Journal Staff Writer

A curious object on the plaintiffs' side of the courtroom during California's first so-called "suitable seating" trial proved to be a quiet distraction. The set of wooden counters, meant to represent a Kmart Corp. cashier's workstation, sat near attorneys' desks like an unfinished high school shop project. The rough plywood mock-up never entered any arguments made during the trial — it simply remained there, unmentioned. In the end, in the court's decision finding in favor of Kmart, U.S. District Judge William Alsup described the mock-up as a "beached whale" in the courtroom, subpoenaed by Kmart's lawyers only to be ignored.

The mock workstation had been created with the same mission as the lawsuit itself: to prove that cashiers could perform their job duties from a seat. The trial could have set a precedent, opening the door to millions of dollars in penalties for similar cases that attorneys have filed against retailers and banks throughout the state. But the case ended with a small settlement last week, failing to pave the way for similar suits.

After analyzing videos, diagrams, and expert testimony, Alsup found in December that Matthew Righetti of Righetti Glugoski PC and his co-counsel did not adequately prove a class of cashiers from the Kmart in Tulare could safely sit while ringing up customers. Then he gave them a second chance, certifying a new class of cashiers from a Redlands Kmart store in June.

With the case's settlement late last month, that chance is gone. Righetti's team worked out a deal with Kmart's attorneys, led by Paul Hastings LLP partner Jeffrey Wohl in San Francisco, that released the claims in exchange for $280,000 — and no attorney fees. *Garvey v. Kmart Corp.*, 11-2575 (N.D. Cal. filed May 27, 2011).

Now that the case is resolved, attorneys are re-evaluating the value of "suitable seating" cases, which are based on an all-but-forgotten state statute requiring seats for certain employees. The law comes from a wage order originally enacted to regulate the "mercantile industry" in the early 20th century. Until the recent spate of cases, courts had never decided whether the law applied to cashiers or bank tellers. Thus, these seating cases were billed as the next wave of litigation in employment law and poured in throughout the state.

The less-than-profitable resolution of the Kmart case likely indicates the suits don't have any oomph behind them, attorneys say.

"The lack of success for the plaintiffs in these cases so far should demonstrate that there's quite an uphill battle for them," said Donna M. Mezias, an attorney with Akin Gump Strauss Hauer & Feld LLP in San Francisco who represented The Home Depot Inc. in a case that resolved late last year. "They might not see as many of these cases filed."

Timothy J. Long, an attorney at Orrick, Herrington & Sutcliffe LLP in Sacramento defending CVS Caremark Corp. in a seating case currently before the 9th U.S. Circuit Court of Appeals, also said he's taking heart from the settlement.

"Your takeaway has to be a common sense one, that is there isn't a large amount of appeal for the plaintiffs' theory, when you sit back — no pun intended — and think about it," Long said.

See Page 3 — SUITABLE

Mediation rules could be changed

Critics blast law that anything said during proceeding is confidential

By Emily Green
Daily Journal Staff Writer

In 2005, Michael Cassel sued his former attorneys, alleging they threatened to abandon him two weeks before trial in a trademark dispute that had gone to mediation unless he agreed to settle for $1.25 million.

The case spurred a major dispute in the legal community over whether communications in mediation — including those between a lawyer and his client — could serve as the basis of malpractice lawsuits and disciplinary proceedings.

Siding with Cassel's attorneys in 2011, the state Supreme Court held that anything said in mediation is confidential and can't be used in litigation later. *Cassel v. Superior Court, 51 Cal. 4th 113.*

Two years later, the effort by some bar associations and legislators to roll back that decision continues. Last week, the California Law Revision Commission, an influential state agency that recommends changes to the law, began studying the relationship under current law between mediation confidentiality and attorney malpractice at the Legislature's directive.

Mediation has taken on an increasingly outsized role in the court system as budget woes have led to massive delays in setting trials. Retired judges frequently take on lucrative jobs as private mediators. But as mediation has become commonplace, concerns have grown that the confidentiality in the process means lawyers who don't adequately represent their clients get a free pass.

This is not the first time the 10-member commission has addressed the question of confidentiality in mediations. In 1997, it recommended near-total confidentiality in mediation except when the parties expressly agree in writing to disclosure of communication. It reasoned that, "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

The commission's recommendations led to passage of the law governing mediation that served as the basis for the state Supreme Court's decision in *Cassel.* This time, the fallout from that ruling and the pressure to address perceived problems in mediation could lead the commission to make more controversial recommendations.

A number of groups across the ideological spectrum opposed legislation introduced last year to address *Cassel.* The legislation, AB 2025, would have allowed communication between a client and his attorney to be admissible in an action for legal malpractice or a State Bar disciplinary action.

At the time, the California Lawyers for the Arts called the bill a "dangerous step towards eroding the long-established firewall of mediation." The Association of Dispute Resolution for Northern California wrote, "On balance, more is achieved by a large number of individuals participating in mediation than is lost by some number of individuals agreeing to ill-advised resolutions."

San Francisco County Superior Court Judge James McBride, who long headed the court's civil division, opposed the bill. He wrote to the Assembly Judiciary Committee that it "poses a serious threat that mediation would become a less successful method of reducing the number of cases brought to resolution by our courts."

On the other side of the debate are the Beverly Hills Bar Association and the Conference of California Bar Associations, a group of attorneys from bar associations

See Page 3 — MEDIATION

LA rail line extension a 'go' — but with high court warning

By Fiona Smith
Daily Journal Staff Writer

In a decision expected to change how agencies must evaluate the environmental impacts of large infrastructure projects, a divided state Supreme Court on Monday sided with Los Angeles transit officials in their bid to expand a rail line.

A majority found fault in the Exposition Metro Line Construction Authority's analysis of the rail project under the California Environmental Quality Act or CEQA, but found that the errors did not warrant a redo. The Expo Authority did not adequately look at the project's near-term effects on traffic and air quality, the court held, signaling agencies may now need to do more analysis for their projects to pass legal muster.

The legal fight began after the local group Neighbors for Smart Rail, concerned about the effect of the project — which extends a Los Angeles rail line to Santa Monica — sued the Expo Authority in 2010. The dispute centered on whether the authority properly relied on future projections of traffic and air quality as its "baseline" to measure the environmental impacts of the rail line.

Neighbors for Smart Rail claimed CEQA requires the use of current existing conditions as the baseline and that by projecting out to 2030, the Expo Authority overlooked the project's short-term impacts on traffic and air quality. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority,* DJDAR 10304.

Justice Kathryn M. Werdegar, writing for the majority, held that agencies do have the discretion to rely on future projected baselines in CEQA analysis, but they must show substantial evidence why looking at existing conditions would be uninformative or misleading. The Expo Authority did not do that in this case, but its CEQA review was legal because it "did not deprive the agency or the public of substantial relevant information on those impacts," Werdegar wrote.

Justices Joyce L. Kennard and Carol A. Corrigan joined Werdegar in the opinion. Justice Goodwin Liu wrote a concurrence largely in agreement, but finding the Expo Authority's CEQA analysis should not stand.

Justice Marvin R. Baxter also wrote a concurrence and dissent— agreeing with Werdegar that the CEQA analysis was adequate, but rejecting her conclusion that agencies must cite substantial evidence if they choose to rely on a future projected baseline.

Werdegar's holding robs agencies of their discretion to choose an appropriate baseline and creates an ambiguous standard that will encourage more litigation and add delays and costs to projects, Baxter wrote.

See Page 3 — RAIL

EA flagged for roughing athletes' rights of publicity

By Dan Nabel

Our society uniformly prohibits only one group of celebrities from commercially exploiting their own celebrity status: college athletes. Under NCAA bylaw 12.5.2, student-athletes are prohibited from commercial licensing of their names or pictures. In fact, if the student-athlete's name or picture is used without the student-athlete's permission, he or she has an affirmative obligation "to take steps to stop such an activity in order to retain his or her eligibility for intercollegiate athletics."

Given the heavily restricted nature of student-athletes' rights to exploit their own celebrity status — and this being America — it was only a matter of time before someone else got around to exploiting it for them (albeit without permission): enter Electronic Arts, with its *NCAA Football* video game series. The game is extremely popular and super realistic, but as EA has recently (and repeatedly) learned the hard way, the game may be a little *too* realistic.

Back in March, I wrote about how EA and its *NCAA Football* games received a major legal blow in a case called *Hart v. Electronic Arts*, 11-3750 (3rd Cir., filed Oct. 7, 2011). In *Hart*, a former Rutgers football player, Ryan Hart, brought a class action lawsuit against EA, arguing that EA had violated his right of publicity by including a digital representation of him in the game without his permission. In a 2-1 decision, the 3rd U.S. Circuit Court of Appeals ruled that EA's First Amendment defense failed because EA failed to "sufficiently transform" Hart's identity. Specifically, the court observed that "[t]he digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game." The court also chastised EA for seeking to increase profits by capitalizing "on the respective fan bases for the various teams and players" by creating "a realistic depiction of college football for the users."

In dissent, Judge Thomas Ambro argued that EA's use of real people as "characters" in its sports games should be treated the same way as portrayals of individuals (fictional or nonfictional) in movies and books. He opined that the inclusion of realistic player likenesses to increase profits should have nothing to do with First Amendment protection. In Judge Ambro's view, by making such a distinction, the majority created a "medium-specific metric that provides less protection to video games than other expressive works." He also stated that digital portrayals of real people should be protected where the likeness, *as included in the creative work*, has been transformed into something more or different than it was before.

This month, in the case of *Keller v. Electronic Arts*, 10-15387 (9th Cir., filed May 6, 2009), EA experienced major déjà vu. This time, Samuel Keller, the former starting quarterback for Arizona State University who later transferred to the University of Nebraska, brought a nearly identical lawsuit. Once again, a 2-1 decision was reached, this time by the 9th U.S. Circuit Court of Appeals. The panel ruled that, at least at this stage in the case, "[g]iven that *NCAA Football* realistically portrays college football players in the context of college football games ... EA cannot prevail as a matter of law based on the transformative use defense."

In dissent, Judge Sidney Thomas criticized the majority for confining "its inquiry to how a single athlete's likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole." Citing to Judge Ambro's dissent in the *Hart* case, Judge Thomas opined that the majority's approach contradicts the "holistic analysis required by the transformative use test." In his view, the "salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered."

> In what appears to be a new, albeit unannounced, bright-line rule for video games, all three cases ... seem to be singing the same tune: It is not transformative to depict celebrities in a video game doing exactly what they normally do for a living, especially if it is in the exact same setting.

In both cases, all judges agreed (at least theoretically) that the appropriate test was the "transformative use defense" developed by the state Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001). The test is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." To make this determination, both courts ostensibly looked at the five *Comedy III* factors, including whether: (1) the celebrity likeness is one of the raw materials from which an original work is synthesized; (2) the work is primarily the defendant's own expression if the expression is something other than the likeness of the celebrity; (3) the literal and imitative or creative elements predominate in the work; (4) the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and (5) an artist's skill and talent has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity's fame. Yet, out of six federal appellate judges (all ostensibly applying the same 5-factor test), four reached one result and two reached an opposite result.

This is nothing new. It has always been incredibly difficult to predict the outcome of right of publicity cases and some would say it is even more difficult to try and reconcile the outcomes. That being said, there is much to be gleaned from these two rulings against EA.

In both cases, the majority opinions relied heavily on the case of *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018 (2011). In the *No Doubt* case, members of the rock band "No Doubt" appeared in a game published by Activision called *Band Hero* where users could simulate performing in a rock band in time with popular songs. Activision licensed No Doubt's likeness, but exceeded the scope of the license. When the 9th U.S. Circuit Court of Appeals analyzed Activision's "transformative use" defense, the court ruled against Activision because the video game characters were "literal recreations of the band members" doing "the same activity by which the band achieved and maintained its fame." The court ruled that the fact that the avatars appear in a context of a videogame that contains many other creative elements[] does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities."

Sound familiar?

In what appears to be a new, albeit unannounced, bright-line rule for video games, all three cases — *No Doubt*, *Hart*, and *Keller* — seem to be singing the same tune: It is not transformative to depict celebrities in a video game doing exactly what they normally do for a living, especially if it is in the exact same setting. While the dissenting judges urge a "holistic" examination of the game, any game developer with a lick of sense is going to pay close attention to the bright-line rule. Some may contend that this may not be the same rule that exists for books and movies — and that it may not be fair — but this is the direction the law is headed. Which once again brings to mind former Supreme Court Justice Benjamin Cardozo's famous words: "The law never is, but is always about to be."

Dan Nabel *is an associate in Greenberg Glusker Fields Claman & Machtinger LLP's Litigation Group. He handles a variety of litigation matters and provides advice in the areas of real estate, business, entertainment, and intellectual property.*

DAN NABEL
Greenberg Glusker

Fraud concerns as SEC lifts decades old solicitation ban

By Mark Ankcorn

Soon, the airwaves, Internet and print media may be filled with ads soliciting the opportunity to buy into starts-ups, hedge or private equity funds.

Consumers have been spared these pitches for years under Regulation D (Rule 506) of the Securities Act of 1933. But unfortunately, the Securities Exchange Commission recently voted to lift this more than 80-year-old ban on public solicitation of investments in private companies, which means that hedge funds and start-ups can now advertise publicly for funding.

Under the new Rule 506(c), companies will now be able to "generally solicit" to prospective investors. The new rule will be added as a new subsection (c) to existing Rule 506.

The rule, which passed earlier last month by a 4-1 vote of the commission, is the first one mandated by last year's Jumpstart Our Business Startups (JOBS) Act to be completed by the SEC. The regulations are likely to take effect in September.

Now, startups and other small companies can use advertising to raise unlimited amounts of money. At first blush, it seems like a good idea. Why should early stage investments be limited only to "qualified investors" who have more than $1 million in assets? Why can't regular folks pool their money to back a good idea or a new technology? After all, it's been a revolutionary and effective tool for interesting devices, video games, movies and other projects on crowdfunding sites like Kickstarter.

On a deeper analysis, however, this recent ruling creates many opportunities for massive fraud at a grassroots level. In short, the ban on advertising was originally established with very good reason — to protect investors. The biggest potential downside of the new ruling: fraudsters who dupe consumers into pouring the money into bad funds.

In fact, lifting the ban will enable sophisticated financial swindlers to target regular people. Instead of the oversight provided by a company like Kickstarter, which zealously polices its projects to eliminate even a trace of swindle, under the new JOBS Act rules the only watchdog will be the SEC. This is concerning, as the overburdened SEC is already deluged with schemes and frauds.

Proponents hope the ruling will fuel the economy with new sources of capital. "As we fulfill our mission to facilitate capital formation and maintain fair and efficient markets, the Commission must always focus on strong investor protections," said Mary Jo White, chair of the SEC, in a press release. "We want this new market and the private markets in general to thrive in a safe and efficient manner, and these rules we adopt and propose are designed to facilitate that objective."

But Democratic Commissioner Luis Aguilar, the lone dissenter, warned that the new rule "will prove be a great boon to the fraudster" and could "lead to economic disaster for many investors."

In fact, many are deriding the decision — and calling for follow up regulation — and the Department of Justice and Federal Trade Commission are bracing themselves for an onslaught of complaints when the ban is officially lifted next month.

According to Tim France with the U.S. Postal Inspection Service, the impact of lifting the ban will be a "giant tsunami" of fraud. "So-called 'entrepreneurs' can now just set up a website and advertise for investors to put even $50 into a project, getting only equity in return," France said.

The biggest area to watch for fraud is medical/biotech schemes. Anyone promising "advanced research" into a cure for autism or breast cancer or diabetes will find a willing list of thousands eager to have some kind of good news, no matter how remote.

Here's an example of how that might happen: A newly formed LLC with no assets and no product uses carefully targeted Google ads and late night infomercials to tout its "advanced research" into a cure for autism. The fraudsters frequent online forums and discussion groups — pretending to be parents of an autistic child who have heard about this "breakthrough therapy." They claim that this struggling company can't find regular investors and needs our help, so "we're investing now so we can be guaranteed a spot for our child." Wouldn't you do the same?

It's sad and it's frightening, but swindlers have long preyed on the fears and hopes of people in difficult circumstances and are more than willing to take the money of the most vulnerable members of society.

The new rules will fundamentally change the way that private offerings have to date been conducted by opening up a new universe of potential investors — from a wide range of social media forums such as LinkedIn, Facebook and Twitter.

For all of these reasons and more, carefully thought out follow-up regulation is key. In the meantime, expect an onslaught of financial scammers, consumer complaints — and litigation.

Mark Ankcorn *is an attorney with San Diego-based Casey Gerry Schenk Francavilla Blatt & Penfield LLP and a member of its class action litigation practice team. He is currently the lead plaintiffs' counsel in national class actions against some of the world's largest financial services corporations.*

MARK ANKCORN
CaseyGerry

Silicon Valley business model in jeopardy?

Continued from page 1

where in the world, if stored or transited by a U.S. firm, is now also the property of the U.S. government.

Why should this concern those of us interested in U.S. industry? U.S. high-tech firms are at both the center and edges of the global information and communications infrastructure. Consider the firms that provide the software running the global ICT infrastructure: Cisco, eBay, Facebook, Google, IBM, LinkedIn, Microsoft (and its subsidiary Skype), Oracle, PayPal, Twitter, and Yahoo! — all of them are U.S. firms and all are subject to the control of the U.S. national security state. Each of these firms is as important and valuable as it is because of their global market share. Moreover, when one considers the successes in the U.S. economy, it is these firms that come to mind.

Not one of the great Silicon Valley success stories of the last two decades would be so economically dominant without their global economic success. China is particularly interesting because for national security reasons (which everyone previously thought was merely market protection in another form) it essentially closed its market to U.S. Internet giants. Tragically, the recent revelations about the U.S. government's (mis)use of U.S. firms to collect data on foreign citizens make it appear as though the Chinese government was prescient on the U.S. government's predilection for spying on foreign nationals in their own nations. Already, foreign nations and firms believe that the U.S. government and its security contractors share valuable information with privileged U.S. firms? After the Snowden affair, how could they pretend this is the case?

How crazy is the situation? Yahoo! must petition a secret court to release information on how it has resisted government incursions into the privacy of users. Microsoft is forced to admit that its products have trapdoors that the U.S. government can use to spy on users anywhere in the world. Effectively, every personal computer in the world using Microsoft software has its security irreparably compromised. Leaders of major U.S. technology firms are forced to lie to the public and leaders of other nations about what they are being forced to do by the Obama administration and its secret courts. This will not end well.

> Will nations outside the U.S. decide that it is time to create their own PC software, cloud servers and even commercial Internet infrastructure to protect their citizens from the U.S. government?

Will nations outside the U.S. decide that it is time to create their own PC software, cloud servers and even commercial Internet infrastructure to protect their citizens from the U.S. government? This may serve the interest of local businesses that have found themselves unable compete against the U.S. leaders. Such a movement could begin attempts to move U.S. firms from the center of the Internet that would be a tragedy for all U.S. citizens. If the U.S. government cares about the future of our global information technology leaders, then they would immediately work with our firms and foreign governments to guarantee that the Internet is free of government snooping. We are on the precipice of movement from an open, global Internet to one divided by national jurisdictions. This reckless behavior on the part of the U.S. national security apparatus is harming our firms and global users. Worse, there is no evidence that we are any safer.

While the Obama administration has adopted a "shoot-the-messenger" approach to Snowden's revelations, in fact, U.S. and global citizens should thank him for exposing these remarkably cavalier actions of the U.S. government.

Martin Kenney *is a professor in the Department of Human and Community Development at UC Davis and senior project director of the Berkeley Roundtable on the International Economy. He can be reached at mfkenney@ucdavis.edu.*

SUBMIT A COLUMN
The Daily Journal accepts opinion pieces, practice pieces, book reviews and excerpts and personal essays. These articles typically should run about 1,000 words but can run longer if the content warrants it. For guidelines, e-mail legal editor Ben Armistead at ben_armistead@dailyjournal.com.

WRITE TO US
The Daily Journal welcomes your feedback on news articles, commentaries and other issues. Please submit letters to the editor by e-mail to ben_armistead@dailyjournal.com. Letters should be no more than 500 words and, if referencing a particular article, should include the date of the article and its headline. Letters may not reference a previous letter to the editor.